Ontario

# ROYAL COMMISSION OF INQUIRY INTO CERTAIN DEATHS AT THE HOSPITAL FOR SICK CHILDREN AND RELATED MATTERS.

Hearing held
21 floor
180 Dundas Street West
Toronto, Ontario

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| The Honourable Mr. Justice S.G.M. Grange | Commissioner |
| P.S.A. Lamek, Q.C. | Counsel |
| E.A. Cronk | Associate Counsel |
| Thomas Millar | Administrator |

Transcript of evidence
for
June 25th, 1984

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ROYAL COMMISSION OF INQUIRY INTO CERTAIN DEATHS AT THE HOSPITAL FOR SICK CHILDREN AND RELATED MATTERS

Hearing held on the 21st Floor, 180 Dundas Street West, Toronto, Ontario, on Monday, the 25th day of June, 1984.

THE HONOURABLE MR. JUSTICE S.G.M. GRANGE - Commissioner

THOMAS MILLAR - Administrator

MURRAY R. ELLIOT - Administrator

APPEARANCES:

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|---|---|
| P.S.A. LAMEK, Q.C.)<br>E. CRONK ) | Commission Counsel |
| L. CECCHETTO | Counsel for the Attorney-General and Solicitor General of Ontario (Crown Attorneys and Coroners' Office |
| I.J. ROLAND ) | |
| M. THOMSON )<br>R. BATTY ) | Counsel for The Hospital for Sick Children |
| B. PERCIVAL, Q.C. | Counsel for The Metropolitan Toronto Police |
| K. CHOWN | Counsel for numerous Doctors at The Hospital for Sick Children |
| J. SOPINKA, Q.C.<br>D. BROWN | Counsel for Susan Nelles - Nurse |
| G.R. STRATHY<br>P. RAE | Counsel for Phyllis Trayner - Nurse |

(Cont'd)

APPEARANCES: (Continued)

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|---|---|
| F.H. SHANAHAN | Counsel for Mr. & Mrs. Dominic Lombardo (parents of deceased child Lombardo); and Heather Dawson (mother of deceased child Amber Dawson) |
| J. SHINEHOFT | Counsel for Lorie Pacsai and Kevin Grant (parents of deceased child Kevin Pacsai) |
| F. KITELY | Counsel for the Registered Nurses' Association of Ontario and 35 Registered Nurses at The Hospital for Sick Children |

VOLUME 160

I N D E X

E R R A T A

VOLUME 152, page 743, line 13 - "those deaths: should read "this death"

743, line 22 - 4 and 4A should be 4A

751, line 20 - "to the" should be "the"

VOLUME 153, page 776, line 6 - "with retallin" should be "to adrenaline"

page 816, line 1 - "July 2" should be "July 22"

VOLUME 159 - Pages numbered 1156 - 1166 should be 1856 - 1866

page 1926, line 17 - "glutted" should be "occluded"

1928 - 19 "4B" should be "4A"

1936 - 15 "4.9" should be "1.9"

A
M/cr

---On commencing at 10:00 a.m.

THE COMMISSIONER: Well now I guess I should call Mr. Shanahan, first, but he is not here.

Mr. Shinehoft, are you next, or is Mr. Tobias next?

Mr. Tobias is next but he is not here so, Mr. Shinehoft.

MR. SHINEHOFT: Well, I have a comment I would like to make in this regard, Mr. Commissioner. I don't know whether it will have some disfavour with you or not. It seems to me the order of presentation of the argument is such that we are in a position as parent's counsel where we have to reply to our own argument.

THE COMMISSIONER: The great advantage of that is you don't have any work to do.

MR. SHINEHOFT: That may be so. I would like if possible --

THE COMMISSIONER: They are replying to you and you can't then reply to their reply to you that's all. However, I never follow the rules and if you get desperate I will hear from you, but that means of course - if at the end you find you are in bad shape that somebody has said something - but in the ordinary course what happens is, you know, it

depends on the kind of trial usually we hear from the plaintiff's counsel, the defendant's counsel and the plaintiff's counsel and then if you hear from defendant's counsel this thing could go on forever.

MR. SHINEHOFT: Well, I am not proposing that, Mr. Commissioner. What I am saying is, and I know you will treat it with every application individually, that it may be that either myself or one of the parent's counsel may wish to make one or two comments after all the submissions and reply is in.

Thank you.

THE COMMISSIONER: All right. Thank you. Mr. Labow?

Mr. Labow is not here.

Miss Kitely.

REPLY ARGUMENT BY MS. KITELY

MS. KITELY: Very briefly, sir, I understand that Mr. Roland will be making submissions to you by way of reply. I don't know exactly what he is going to say but I can surmise some of the logisitics of his submission. Could I say, sir, that probably I will agree with those that Mr. Roland will be making with respect to the guidelines that Mr. Scott proposed to you and allow myself 30

seconds when he is finished to agree or disagree with the position he has taken. I say that, sir, to avoid the necessity of my replying to you, I know that Mr. Roland is going to do a brilliant job.

THE COMMISSIONER: One thing, we will know if she stands up that your job wasn't that great.

MR. SOPINKA: Does she know what that is worth to a lawyer on national television.

THE COMMISSIONER: All right. Nobody seems to be too pleased with the system but there it is.

Mr. Young.

MR. YOUNG: Sir, we have no reply.

THE COMMISSIONER: Oh yes, I am sorry.

MS. KITELY: Sir, I have two other brief points to make. Much has been said to you in the last couple of weeks about patterns, and the rest of my submissions I am in agreement with Mr. Scott that the pattern ought to be the end, not the means to the end. Could I remind you, sir, of the position taken in fact by Mr. Lamek. That was according to my account, Commission Counsel has eliminated 10 from the categories of suspicion or high level or low

level of suspicion. If we eliminate even those 10 and I of course go much further, if we eliminate those 10 then we are down to 26, the fewer the number the less compelling the pattern itself.

Finally, sir, Mr. Tobias in his comments referred to Dr. Bain in Dr. Bain's evidence that he had never seen a patient die of a medication error. I do not mean to repeat my submission except to point out that the whole thrust of it was to explain how it could happen on the one hand, Dr. Bain had the last word on that; but secondly and perhaps more importantly that an error could account for a level of digoxin, if not death, then certainly account for a level, and those are my submissions.

Thank you, sir.

THE COMMISSIONER: Yes. All right, thank you.

Miss Cecchetto.

MS. CECCHETTO: We have no reply, sir.

THE COMMISSIONER: Yes, Mr. Strathy, you are next.

REPLY ARGUMENT BY MR. STRATHY

MR. STRATHY: Yes, Mr. Commissioner. Just very briefly, I do not propose to reply to any

of the submissions concerning the technical aspects of the case as it relates to digoxin, pharmacology, cardiology and so forth. I don't think you would thank me for repeating what I said in my principle submissions.

I only say that one of the critical issues in this whole area seems to be the importance of significance one can attach to the exhumed and fixed tissues. In my respectful submission there are some counsel who have urged upon you that you should attach a greater importance than is apparent from the opinions of those who are knowledgeable in that particular area. I refer to the submissions that I made in chief.

I would like, however, to comment briefly on what seems to be a major split in the submissions of counsel as to how you ought to approach your task, as to what exactly your responsibility is.

I think the split lines up with Mr. Scott, myself and Miss Kitely on the one hand and the remainder of our friends on the other hand, with perhaps Mr. Lamek and Miss Cronk attempting to steer some sort of middle road.

I have two submissions with respect to, what in my respectful submission is your obligation

To some extent it reiterates what I said in my submissions in chief.

The first point is this. That it goes without saying that your report when it is finally prepared must be internally consistent if you will, and I say this with respect, it must make sense on its face. The Court of Appeal has said what you may not say in your report. In my submission it would be inappropriate for you to come to conclusions in your report which are not supported on the evidence which you are able to lay out in your report. If one picks up your report five or ten years down the line one would hope that one could read it and say, all right, I see the findings here and I see the conclusions here, and based on the findings that are set out I can see how the Commissioner comes to his --

THE COMMISSIONER: What you are saying is I should reach a conclusion that I wouldn't reach logically because I can't report.

MR. STRATHY: No, where you are not able to reach a conclusion as a result of things that you are not able to report on you should follow the course which I suggested, and that is simply set out the evidence. That we should not have to look behind

what you say in your report and attempt to guess at how you came to your conclusions. I say that because it would be a very damaging thing, dangerous thing, if the public, the media and perhaps the Attorney-General was forced to speculate as to how you came to your conclusions, because then they might speculate that you came to your conclusions based on things that in fact were not reasons in your mind.

So that there is, with respect, a middle ground which you can take and that is where the injunction of the Court of Appeal does not allow you to state the facts upon which you rely, to simply set out the evidence, in my submission, that is really quite clearly set out in your mandate and in your terms of reference.

THE COMMISSIONER: I would like to follow this up a bit; set out the evidence, you mean something like the Atlanta Report?

MR. STRATHY: I think the Atlanta Report is clearly before the Attorney-General and it is clearly before the public. What I am talking about is the evidence as to how and by what means the pharmacological, medical, toxicological evidence --

THE COMMISSIONER: I can certainly set out that, that can certainly be a basis for reaching

whatever conclusion I do reach, there is no problem about that. The problem is the pattern, can I set forth the pattern in the report?

MR. STRATHY: I don't see, sir, any reason why you need set out the pattern. The pattern of the Atlanta Report evidence has been filed, the Atlanta Report was delivered to the Attorney-General.

THE COMMISSIONER: It has been argued before me the pattern, one of the things that I should take into consideration and it seems to me I would have to deal with that argument, I don't have to accept it, but the pattern of the time of night, the presence of one team on the scene at all times, that is the pattern that is part of the circumstancial case that is being made for death by digoxin toxicity.

Now do I set that out?

MR. STRATHY: I don't see that you need set it out, sir.

THE COMMISSIONER: Just assuming that I accept the argument, one of the things that caused me to reach the conclusion of digoxin toxicity, should I set it out in the report, if it is, if I think it is?

MR. STRATHY: What I think you might do is simply refer to the evidence with respect

to pattern without more. Simply say this is the evidence, lay out the evidence, but not necessarily are you obliged to say, because of this evidence I conclude that the scale is tipped because I think that contravenes --

THE COMMISSIONER: Supposing it is a fact, then you say the reader does not know anything about the problems we have had to face reading the report, if I reach that conclusion, if you can only understand I have reached that conclusion of setting forth the facts that led me to the conclusion.

I just simply ask you, should I, should I put those facts in.

MR. STRATHY: I think I have said two things and perhaps I haven't said the second thing, but I support what Mr. Scott said if pattern is all you have to go on you --

THE COMMISSIONER: I should not accept it.

MR. STRATHY: No.

THE COMMISSIONER: No, it is an argument that has been put forward and I have to deal with it, and at least I have to deal with it in my mind. Whether I have to deal with it in the report or not I don't know, but I have to reach the

conclusion whether these children died naturally or died from digoxin poisoning.

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P/hr

MR. STRATHY: I think the answer then that I have to give you is that it is much more dangerous for you to come to a conclusion on which the evidence is not revealed, in your report, than it is for you to at least set out the evidence in some neutral way.

I hope you understand my submission, sir. It is this, that there is a danger of you coming to a conclusion ona particular child for which a reader looking at the evidence says: I don't understand how the Commissioner reached this conclusion.

THE COMMISSIONER: That is right; that is what Mr. Justice Krever calls an unintelligible report.

MR. STRATHY: I am not sure. I have said two things, the one is I do not think you should be looking at the pattern --

THE COMMISSIONER: I have to deal with the argument. Logically I have to deal with the argument that has been put. Does the pattern affect it at all?

MR. STRATHY: Presumably if you think it is an important piece of evidence you report on the piece of evidence which is what the Court of Appeal has said, you may report on that.

THE COMMISSIONER: What about the

argument? I report on the evidence. The evidence is in most instances, most of these children, one team was on duty at the time. I report that fact. Then what do I say? If I reach a conclusion that the children were poisoned do I say that that is the one of the reasons --

MR. STRATHY: That is what the Court of Appeal has said that you may not do.

THE COMMISSIONER: Then how does this report become intelligible?

MR. STRATHY: At least it sets out the evidence.

THE COMMISSIONER: I do not say whether I accept the evidence or not, is that it?

MR. STRATHY: I think that is a problem you are faced with in view of the Court of Appeal's injunction. I think the only thing that I offer to you is a way of dealing with that and that is not coming to a conclusion in a particular case. It is simply saying that in view of the evidence and in view of what I have been told by the Court of Appeal, I am not in a position with respect to these children to state a conclusion.

THE COMMISSIONER: That is not what they say. They say I am to analyse.

MR. STRATHY: They say you are to analyse and report on the evidence.

THE COMMISSIONER:

"The Commissioner is obliged to hear all of the evidence relating to the cause of death of the children and this would include evidence which tended to show that one or more of them died as a result ... he should analyse and report on all of the evidence with respect to the circumstances of each death and if he can, make recommendations with respect to that evidence "

There is the problem, they said I cannot - but this is an argument that has been put to me by several counsel that because of the presence of a pattern I can conclude that it was digoxin poisoning.

MR. STRATHY: We go back to what I said in my main submissions to you, sir, what the Court of Appeal said is that you are to analyse and report on all of the evidence, not to determine on the evidence but to report on the evidence. What I say to you is that if you confine yourself to reporting on the evidence and not determining then you fulfill the obligation imposed by your terms of reference

and you do not stray from what the Court of Appeal has said that you must do.

THE COMMISSIONER: This reader of yours, this fictitious reader, I must say, because I don't know of anybody who is reading any back reports on any subject, but assuming --

MR. STRATHY: Apparently, Miss Kitely has, and government people.

THE COMMISSIONER: Maybe. Whoever it is that reads this report in 1994 and says: how can he possibly reach that conclusion, I suppose what he can do is analyse and reach a conclusion whereas I cannot. Is that the idea? The evidence is all there for him and he says that the Commissioner clearly did not act upon this, he reached the conclusion but he should have reached it in a different way or should have reached it the same way by a different route.

MR. STRATHY: I think what he can say is the Commissioner, because of his terms of reference and because of what the Court of Appeal has said to him did not come to a determination or come to a conclusion in this particular case. What the Commissioner did, being faithful to his terms of reference, was simply to report upon the evidence. The Commissioner simply sets out the evidence. I

submitted to you, sir, in my submissions in chief that there is a significance to the fact that your terms of reference do not require you to determine how and by what means. If you were sitting as a coroner with a coroner's jury the jury would be obliged to determine how and by what means.

THE COMMISSIONER: Yes.

MR. STRATHY: I think you have my point on that.

My other point was with respect to the burden. You made an observation when Mr. Tobias was in the course of his submission to the effect that because your report did not have an effect on any person, in other words, since you are not censuring any person or imposing a penalty upon any person or affecting, because of the Court of Appeal, any person directly or indirectly, that cases with respect to burden did not have an application. At least that is how I read your exchange with Mr. Tobias.

THE COMMISSIONER: I don't know if I went quite that far. I think it would have some effect on it.

MR. STRATHY: I would like to respond to that. I think that if you are in effect saying in any case that a child received an intentional

dose of digoxin, and let us leave aside numbers, let us say any one case or any one child at the Hospital for Sick Children, if you turn to the parents of that child and the public, in my submission the level of assurance you want to have, to use Mr. Scott's expression, you want to have a full measure of assurance.

THE COMMISSIONER: Surely it is a little bit different if the person is not identified than if the person is.

MR. STRATHY: With respect, I do not think it is. I think the significance of saying to a parent or to the public that a parent's child has been murdered requires a very great measure of assurance. It is the same if you say that to the public generally, to say that the child at this Hospital has been murdered in my submission calls for a greater level of assurance than you would apply in a civil case, for example, saying the light was red or the light was green.

The significance of that finding, the nature of the finding itself, calls for a greater degree of certainty and a greater weight in the evidence.

Anticipating what Mr. Roland is going to submit to you, sir, I have no further submissions.

THE COMMISSIONER: Mr. Sopinka.

REPLY ARGUMENT BY MR. SOPINKA:

MR. SOPINKA: If you do not mind, sir, I will use the lectern. It allows me to see you at a different perspective. I am a little intimidated being so close.

THE COMMISSIONER: That is one of your arguments that will under no circumstances be accepted.

MR. SOPINKA: First of all I think I should clear up our position with respect to the argument as to whether or not it was murder or not murder. Mr. Strathy implied, I gather, that we are in the murder camp. I made it very clear during my argument that we are taking no position. There are arguments both ways. What I dealt with was the worst case. Assuming it was murder and assuming that the eight children that Mr. Lamek felt were murdered then I submitted that Miss Nelles was not part of the pattern.

I wish to respond to a statement that was made by Mr. Percival at page 1507 of the transcript. He was referring to Mr. Lamek's four propositions as to why the deaths had ceased and he said that it was interesting to note that Mr. Lamek did not note a fifth possibility, a proposition that Miss Nelles was

working in conjunction with another individual.

There was obviously a very good reason for Mr. Lamek not referring to that because he was careful to base his submissions on circumstances where there was some evidence and this had not been pursued by any counsel. There was obsolutely no evidence with respect to it. I submit that on ethical grounds as well as a rule of fairness and a rule of evidence, grounded on unfairness that was an improper statement.

THE COMMISSIONER: Certainly I think as I indicated to Mr. Brown, if there is to be evidence offered --

.....

THE COMMISSIONER: I should follow Miss Kitely's example and get out a certain book to present to you but if evidence is to be presented it must be - it is our discovery rule, but it must be put to the witness for -for concrete evidence it must be, but surely the inferences drawn on the evidence that is there is partly legitimate to put an inference to the Court and the Court can either accept it or not accept it.

What I said to Mr. Percival - my resolution on that problem - is that I couldn't put it in the report anyway.

MR. SOPINKA: Well --

THE COMMISSIONER: Or make any suggestions as to Susan Nelles or anyone.

MR. SOPINKA: I submit that it was unethical for him to make that statement and I am going to cite authority.

THE COMMISSIONER: All right.

MR. SOPINKA: And I submit that he should not have said it in argument in view of the fact that there was no evidence, but more importantly that it had never been put to Miss Nelles and there is a very well known rule that has been adopted by

the Supreme Court of Canada that you shouldn't even argue about a matter imputing bad character or attacking the credibility of a witness unless you had the courage to put that evidence frontly to the witness when the witness was in the witness box.

There was certainly no evidence of any conspiracy by Susan Nelles led before this Commission that it implicated her.

The farthest that you could take it was that there was a theory that Mr. Percival put, once or twice, that maybe there was another nurse acting as a lookout but there was absolutely nothing to support that. It was just made out of old cloth. And certainly any suggestions that he made didn't involve Miss Nelles. So, as far as any theory implicating Miss Nelles as a lookout or anything else, there is absolutely nothing in the evidence to suggest it.

His Honour, Judge Vanek, was careful to point this out at the Preliminary Hearing. In his Reasons at Page 37 - and, of course, you are entitled under the Order-in-Council to have regard for what Mr. Vanek said.

He said:

"There is no suggestion in the

"evidence of any conspiracy to commit these offences and it is entirely unlikely that two or more people acting independently would go about the Hospital killing babies by digitalis poisoning."

In other words, he said there is no evidence of conspiracy and it is unlikely that two people would be doing it independently.

So that there, where the Crown and the Police had every opportunity to lead evidence have led no such evidence and in my submission they have led no such evidence here.

Now, the rules of professional conduct provide in Ruling 8:

"A lawyer must not knowingly assert that for which there is no reasonable basis in the evidence."

Mr. Lamek, in his argument, was very careful to point out that when he was making - or pointing out the four possibilities - and one of them was that when Susan Nelles was arrested they had arrested the culprit. He said:

"Let me stress, there is absolutely no evidence for any of the first three

"of these."

Now, if all Mr. Percival was doing was adding a fourth possible theory, he should have pointed out that there was absolutely no evidence to support it but he was just making it out of old cloth.

That ruling is no idle provision. A very famous barrister in this jurisdiction was charged by the Law Society when he made imputations in a fatal accidents case certain persons were implicated in the death of the victim and it turned out that there was no evidence with respect to that.

Now, the second basis on which I submit, with respect, that the statement was improper was that Miss Nelles testified fully about the care of the children and denied any complicity, conspiratorial or otherwise in the deaths.

There was never any suggestion from Mr. Percival that she was involved in a conspiracy and she left the witness box without that imputation ever having been put to her.

I submit that fairness requires that a counsel who intends to make allegations against the credibility or character of a witness must confront the witness while the witness is in

the witness box, to give the witness an opportunity to explain. In other words, in combat and in litigation, sneak attacks are frowned on.

Now, I want to refer you to the law with respect - and I am sure it is familiar to you - but it bears repeating in this case because it is clear that it is not just if, as is a matter of argument, that should not even be argued. If you did not comply with that rule it shouldn't be argued to the jury or to the judge.

Now, I appreciate that you are not bound by the rules of evidence but I think you have exhibited the rules of fairness to apply.

In the famous case of Browne v. Dunn, which is reported in 1894, 6th Law Reports, 67, Lord Herschel said this:

> "Now, My Lords I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness is not speaking the truth on a particular point to direct his attention to the fact by some questions put in cross-examination showing that that imputation is intended

"to be made, and not to take his evidence and pass it by as a matter altogether unchallenged, and then when it is impossible for him to explain, as, perhaps, he might have been able to do if such questions had been put to him, the circumstances which it is suggested indicates that the story that he tells ought not to be believed to argue that he is a witness unworthy of credit.

My Lords I have always understood that if you intend to impeach a witness you are bound, while he is in the box, to give him an opportunity to make any explanation which is open to him. As it seems to me that it is not only a rule a professional practice in the conduct of the a case but it is essential to fair play and fair dealings with witnesses. To my mind...."

And this is Lord Halsbury:

"To my mind nothing would be more absolutely unjust than not to

"cross-examine witnesses upon evidence which they have given so as to give them notice and to give them an opportunity of explanation, and an opportunity very often to defend their own character. And not having given them such an opportunity,to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts that they have deposed to."

THE COMMISSIONER: Well, I am not defending Mr. Percival. One of the reasons I am not defending him is that it is totally irrelevant to me because it is something that I cannot report on. But, surely Miss Nelles made it perfectly clear in her evidence that, first of all, she did not kill any of the children, and secondly, she was not engaged in any sort of conspiracy with anyone else.

It certainly never entered my head that she was leaving any opening that way. There is no question that that was her position and so she was not led astray in any way by the failure to ask that question.

MR. SOPINKA: No, but there might have been -

I mean, the suggestion that she might of been conspiring, there may have been a great deal of evidence that she might of given to refute that or relationships that might negative that there could ever be such an agreement and so forth.

That was never put. And I think that is the reason for the rule and I think that it is particularly important in this kind of a case.

And I asked Mr. Percival, does he have any idea in these circumstances, when Miss Nelles went through a long preliminary hearing and then the Court said there is no evidence and she is trying to rebuild her life. For this kind of statement to be repeated on the front page of the Globe and Mail, headlines in the media, does he appreciate what that does to someone like Miss Nelles?

I am sure if he did he wouldn't make irresponsible statements of that kind. Furthermore, I submit, with respect, that if all people acting for the police, given the past history of this thing, he should be the last person to be making statements about her unless it is based on evidence. Because that is the accusation about the first part - the preliminary hearing - and that is going to be the

subject of Phase II.

Now, that is all I have to say about that matter.

On a smaller sclae, Mr. Young submitted that someone had attempted to kill Janice Estrella on January the 7th - that was the long night shift of January 6th - and that that should be taken into account as part of the pattern.

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DM/ko

I just want to point out that if that was part of the pattern, Miss Nelles was not part of it because Baby Estrella suffered an arrest on January 7th at 7:00 a.m. and the sample was taken at 8:20 a.m. on January 7th and it disclosed a digoxin concentration of 9.4 nanograms per millilitre.

Susan Nelles worked the long day shift on January 6th, therefore she finished work at 7:00 or 7:30 p.m., she did not work the long night shift of January 6th and she did not work the long night shift on January 7th and did not return to the hospital until the long day shift on January 10th.

Thank you, Mr. Commissioner.

THE COMMISSIONER: Thank you, Mr. Sopinka. Ms. Chown.

REPLY ARGUMENT BY MS. CHOWN:

Thank you, Mr. Commissioner. I have three brief points to address, two arising out of submissions made to you by Mr. Labow and one arising out of the submissions made by Mr. Percival.

The first is with respect to Mr. Labow's submissions found at Volume 158, page 1753. In that volume Mr. Labow was making reference to the fact that the cardiologists met prior to their giving evidence and reviewed all the charts. It is his inference, as I draw

from that, at the bottom of page 1753 and going over to the top of 1754, that this should in your evaluation of the evidence lessen the weight to be given to it.

My response to that is this. You are aware that a number of the doctors were called to testify before you, and specifically Dr. Rowe was asked to review each and every of the 36 patients. You are aware that he did not have personal care and management of many of those and certainly one purpose of the review was to assist him and to enable him to come before the Commission.

Secondly, it was a review for the doctors themselves as they have stated, to see whether the facts were correct. Whether they in their own individual reviews at the time of the child's death had failed to pick up something of significance. That was how Dr. Fowler put it at Volume 34, page 6638. You have heard in extensive evidence through Dr. Rowe, and that was tendered by Mr. Ortved, that indeed this kind of meeting is nothing unusual, it is in fact how the doctors within the normal hospital routine review the deaths and they do so not to get a party line necessarily, a consensus, to put the care and the management of the child before their colleagues and to ask for their assistance in their perception of the

case. So you may contribute what weight you will --

THE COMMISSIONER: Certainly I don't think there was any suggestion by Mr. Labow or anybody else that there was anything improper in what they did, that was really what they should have done, but the result of it is you get all of them sitting together discussing it and inevitably they reached a sort of collective conclusion which is hard to back away from.

MS. CHOWN: I appreciate that.

THE COMMISSIONER: That is all he was saying. He certainly didn't suggest anything improper. In fact, I would think it a little improper if they hadn't done that, but that is what happened.

MS. CHOWN: My submission is simply that when you are assigning weight to their evidence there are many factors you can put into the equation and how much weight you give to it, I don't think the fact that they met to review these cases prior to Dr. Rowe giving testimony is something that should take away significantly from the weight of the doctors who were called and gave evidence on their particular patients with which they were involved.

THE COMMISSIONER: All right.

MS. CHOWN: Secondly, at the same volume Mr. Labow, at page 1734 was referred to the case

of Real Gosselin and made some comments to the effect that he found it quite surprising about Dr. Freedom's, as he put it, change of evidence, and he referred to that as total change of evidence after his letter that appeared in the chart from the referring physician. We have heard excessive evidence on that point and I would simply say I find it inappropriate of Mr. Labow to characterize that evidence of Dr. Freedom at the Commission is quite surprising. Dr. Freedom's evidence in this regard, found at Volume 29, page 5385 and following, in his direct examination by Miss Cronk was, to be quite open and say, yes, I wrote this letter, perhaps inappropriately, relying on what my resident had told me. My own review of the chart showed that the resident's perception was incorrect. And it is my view that after he read the chart and the physical findings therein that the child was not responding to prostaglandin, he says that at page 5390, Volume 29, it was very clear there was no good response to prostaglandin and that the child remained in persistent heart failure.

Also Dr. Freedom's evidence that he brought this change of view concerning the Gosselin child to the attention of the police during the investigation. It was not in effect a change that came

very late prior to his giving testimony here. I think he has been clear and forthright as to way that change took place and I think you should have regard for his evidence as given before you, of his being more fully informed, if I can put it that way, of his review of the clinical status of the child.

My third point is in response to the submission made by Mr. Percival at Volume 157, page 1516. On that page Mr. Percival is referring to Dr. Freedom's comments that someone was murdering the babies. He calls Dr. Freedom pathetic, and goes on to respond to the suggestion from Mr. Strathy that the police officer swayed the doctor's view. It is really his comment at the bottom of page 1516 I wish to address my comments to and that sentence is:

> "Clearly I think that his evidence that those physicians were already thinking that way ..."

that way being murder:

> "... long before the police came into the hospital."

It is rather a minor point, Mr. Commissioner, but I really wish to confirm that when the physicians involved in this matter first began to think murder was not in any sense to be

described is long before the police came into the hospital. It was really only in mid-March of 1981 after the death of Kevin Pacsai that the doctors for the first time considered digoxin as having a role in the death of the child. As you are aware from the evidence given by Dr. Fowler who was instructed to conduct an investigation, he did so and that report which has been entered as Exhibit 110 was completed on March 20th, 1981, that is the Friday, that weekend, and circulated on that day. As we are aware from Exhibit 110, Dr. Fowler's review was undertaken not with any premise of foul play but looking to see whether innocent explanation, such as an error in the prescribed dosage and the calculation of the dosage drawn up, whether the medicine or the manufacturing could be an explanation. As you are aware, none of those lines of enquiry followed by Dr. Fowler produced an explanation and on receiving his report on Friday, March 20th, Dr. Rowe has testified that at that time he had to confront the possibility of intentional overdose. His evidence in that regard is Volume 17, page 2972 and following. So we are at Friday when at least the possibility of intentional overdose is being considered.

Dr. Freedom did indeed make the comment

that it was his view someone was murdering babies, and his evidence in that regard is found at Volume 30, page 5672 and following. There was a change from his timing in that comment, from his evidence at the preliminary inquiry, when he thought that comment was made perhaps mid-afternoon Saturday, March 21st. His evidence here after he became more aware of the chronology was that in fact he made that comment some time late Saturday night of March 21st after learning of the levels in Allana Miller.

So simply by way of clarification I would point out that it really was not until Friday, March 20th at the earliest that the possibility entered the physicians' heads; Dr. Freedom's comment was made late Saturday night, and as we are all aware events quickly overtook the matter at that point and the police were there shortly after.

Thank you. Those are my submissions in my reply.

THE COMMISSIONER: Thank you. Mr. Roland.

REPLY ARGUMENT BY MR. ROLAND:

Sir, I would like to deal first with the submissions made in a general sense by Ms. Kitely and Mr. Strathy concerning medication errors. As we

know, I think it is abundantly clear from the evidence that you have heard over the last year, medication errors are a fact of life in every hospital. It is fair to say that medication errors are often recognized but many of them are not identified. The reason, the major reason that a medication error is not identified is that the person making the error does not recognize that the error has been made and nothing noticeable occurs as a result of the error. Most errors, as we know from the evidence that has been put before you, are minor in nature and of little or no real consequence.

The errors that were detected on Wards 4A and 4B during the nine month period have been brought to your attention in the evidence, and contrary to what Mr. Strathy may have been suggesting all of the errors that were detected by the hospital during that nine month period have been put in evidence before you. Since then we know there has been introduced on Wards 4A and 4B --

THE COMMISSIONER: You say that - yes, Mr. Strathy.

MR. STRATHY: All that I was suggesting was that Exhibit, I think it is 336 whatever it was the list of the errors during the so-called epidemic

period was deficient in that it did not refer to some two or three other errors that we knew had taken place during that period. I wasn't suggesting the hospital had in any way failed to disclose, or that the evidence had failed to disclose the detected errors during that period.

MR. ROLAND: Then we are agreed, Mr. Strathy and I are agreed that all the errors detected have been put before you.

THE COMMISSIONER: Perhaps not all in one exhibit.

MR. ROLAND: No, that is right, but the evidence discloses they have all been put before you.

THE COMMISSIONER: Yes.

MR. ROLAND: In fact the other three errors were before you before that exhibit. In any event, the introduction of the unit dose system has occurred since the nine month period, and although it cannot, as we know from the evidence that we have seen in the literature, entirely eliminate medication errors, it has and will continue to substantially reduce the number of such occurrences and it is the best medication system available for a hospital of the size of the Hospital for Sick Children.

The medication history and the cause of each of the 36 babies you are concerned with have been thoroughly examined in this process and all of the professional witnesses who have come before this Inquiry have been satisfied that the prescribed medication was entirely appropriate in the circumstances of each individual infant.

The medication history of those babies about which we have significant toxicological information has been closely examined into for the possibility of medication errors. We have not heard anything to suggest that medication error was actually involved in the deaths of any of those babies of which we have significant toxicological information. There has been much speculation but not a single fact that would not permit a conclusion of drug error as the cause of death of any of the 36 babies.

So that drug error as a theory is one which is entirely speculative. It is possible and remains possible because drug errors do occur, but it is not something that can be asserted on the facts, the particular facts that are before you concerning the course of medication of the babies about which we have toxicological information.

It is interesting to note that with

respect to at least some of those babies, and in particular Lombardo, Pacsai, Miller, Hines and Cook there was before you in evidence a fairly clear recollection of the events immediately preceding the deaths of those babies of the detailed events that occurred in that time frame. Those are infants of which there is significant toxicological information concerning digoxin. So that although great time was spent exploring the possibility of medication error and the possibility I suppose is always alive, there are not any facts before you that bear out the possibility.

Second, sir, I would like to turn to Ms. Kitely's recommendations which were part of her written submission and begin at page 42 of her written submission.

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You will recall in that submission Miss Kitely recommends that you propose certain changes in procedure and practices and propose that an investigation take place about the introduction of certain systems of charting and otherwise, things like medication. It is a great list of recommendations. Let me say this about all of those recommendations, that you should not make any of them. We ask you not to make any of them for the following reasons: one, the recommendations concern matters were examined into in very large part by the Dubin Committee and reported on by that Committee.

Secondly, they were matters that were not examined into by this Commission and if you were inclined to make such recommendations as proposed by Miss Kitely you would be acting almost entirely on your own uninformed suspicions that such a recommendation might be useful.

THE COMMISSIONER: I think maybe I have enough problems.

MR. ROLAND: I think you do. These matters have not been examined in evidence by this Commission.

The third reason is because they have not been examined into, sir, you have no sense of

the implications or ramifications of such recommendations on the operations of the Hospital. To make such recommendations may adversely affect other Hospital procedures. Such recommendations may be expensive and hence require money devoted to them that might otherwise be directed to other programs, projects or needs. You, sir, would in an uninformed way be setting priorities with no idea of the competing considerations.

The fourth reason is where there may be some little evidence that touches on the recommendations that evidence deals with events that occurred in 1980 and 1981. Since that time the Hospital has re-examined many of its procedures and policies. It has received and implemented many of the recommendations set out in the Dubin Report and it has improved and updated its own practices as a result of all of these events so that to a great extent the recommendations themselves are out of date.

Finally, sir, and much more technical in a sense, some of the recommendations are beyond your mandate because they ask you to recommend things that go beyond Wards 4A and 4B. For instance with respect to the administration of medication, Recommendation No. 1 under that heading asked that you recommend

that a unit dose system be implemented for all areas of the Hospital. You have had no evidence whatsoever to know whether that is appropriate for all areas of the Hospital or not and the reason you have not is the area that are beyond 4A and 4B are not part of your mandate.

So I say, sir, in conclusion with respect to those recommendations, if you examine them, in light of the reasons I have given you for not making them, you will find that each of them falls prey to one or other of the criticisms I have advanced for even considering recommendations.

Let me turn to Mr. Hunt's categorization of the deaths and his comments about how you deal with the deaths. He suggests that you should express your suspicions or, to use Mr. Lamek's words, your nagging suspicions about the possibility of digoxin playing a role in the deaths of some of the infants. He says you should do that because your suspicions are of greater value as suspicions than other persons. I agree that your suspicions may be of greater value in the sense that they may include both your personal interpretation of highly complex and scientific matters and they may synthesize or sum up the suspicions of others. But if your interpretation of the evidence

concerning any single infant does not bring you more than to a nagging suspicion all you would be saying is that you have an nagging doubt without proof or based on little useful evidence that an infant died of other than natural causes. So that such a nagging suspicion at its highest would then only slightly detract from what should be the principle conclusion with respect to that infant, that is that the infant died naturally of its anatomical or medical condition. Because in a doubtful case like that, there will be in most of the cases abundent evidence or substantial amount of evidence to arrive at the conclusion that the child died of natural causes.

THE COMMISSIONER: There is evidence for all of these children that they died of natural causes.

MR. ROLAND: That is right, and what concerns me, sir, is that you give expression to your feelings of nagging suspicions or nagging doubts or somewhat doubtful because we have been through this exercise for a year now of examining into these matters and it seems to me unsatisfactory to leave them in the air as insubstantially expressed as that. This kind of expression is, with great respect, sir, more the vocabulary of a commentator or a spectator or a

journalist. It is not the primary vocabulary of an adjudicator who is appointed to decide the cause of death as best he is able to on the evidence before him.

THE COMMISSIONER Does it really matter whether I say that some of these children I don't know. Does that make any real difference if I say that I don't know or if I say there is some suspicion that a child died of digoxin overdose. Does that matter one way or the other. If I examine and I cannot say that a child died a natural death, does it really matter how I word it.

MR. ROLAND: If you say after examining all of the evidence that you cannot know one way or the other but there are suspicions, you may also add that you suspect that the child died of natural causes as you may say that I suspect the child died of unnatural causes. If you really cannot know, if the balance is clearly even, then you have no choice but to say so; but in most cases there won't be.

Having made the decision, to then add nagging suspicion or doubt or very little or unsubstantial evidence when the evidence is more substantial going the other way, I say it is not something you are mandated to do.

After all, when you think back, when this inquiry was first called, we had the conclusion from Judge Vanek that Justin Cook was murdered. We had that conclusion. Mr. Hunt's client had, most of us did not, but Mr. Hunt's client had the C.D.C. Report before this inquiry was called and that provided the statistical information concerning access to the infants that died on the ward by certain hospital personnel. Surely then Mr. Hunt's client, the Attorney General, appointed you to inquire into each of the deaths, to choose between, where you could, natural causes on the one hand and unnatural causes on the other, not to leave the matter suspended in the air by suspicions or nagging suspicions, if you could choose.

Now, with respect to how you come to the exercise, we have had argument I gather , which I missed all, from Mr. Scott, Mr. Lamek and Mr. Hunt about how you come to the exercise. Really it is a question of theology.

THE COMMISSIONER: That is a proposition I have not received yet.

MR. ROLAND: What Mr. Hunt is saying on the one hand is that you take Justin Cook's as an incident of murder, a case of murder and

you then look at the period, the nine month period and you presume that they were all murders unless proof is shown otherwise.

Mr. Scott is saying, on the other hand, that you presume they all died of natural causes unless there is proof in each individual case that they did not die of natural causes, that is, that they were murdered. That really then is the question of theology, which end of the debate you start. Is the character of man intrinsically good or it the character of man intrinsically bad.

THE COMMISSIONER: Perhaps if you start from scratch, what they are suggesting is having established that there is in man some defect that you establish by reason of Cook, you then become suspicious, whereas you would not have been suspicious before. Isn't that possible? Isn't that what normal people do. They would say, one child has been murdered, and let us look carefully at the other children.

MR. ROLAND: Yes, and you look carefully at each one of the children to see, but you don't I submit, because Cook was murdered, you do not simply presume that each one of those children was murdered. What the pattern does, is identifies for you, and this is the reason that it causes you so much trouble, it

identifies not the murderer, it identifies the culprit or the possible culprit, but not the murders themselves. You have to look at each individual case and the facts of each individual case to determine whether or not there is sufficient evidence in each of those individual cases to determine if murder occurred. Having determined that, the C.D.C. Report or the pattern may assist you in identifing who did it. The problem that it has caused you and the dilemma we have been in for several months now, the Court of Appeal has told you you cannot do that, but that is the real purpose of the pattern and its proper use, not to decide that this case or that case by itself was murder when there was no evidence other than the pattern.

Thank you, sir. Those are my submissions.

THE COMMISSIONER: All right. Miss Kitely.

REPLY ARGUMENT BY MS. KITELY:

MS. KITELY: Thank you for the thirty seconds, sir. Having introduced Mr. Roland's submissions as brilliant, I cannot agree with his first and second points. I agree to a certain extent with his submission with regard to Mr. Hunt, and I will say no more.

THE COMMISSIONER: Thank you.

REPLY ARGUMENT BY MR. YOUNG:

MR. YOUNG: Mr. Commissioner, I wonder if I might have the opportunity of a very, very briefly reply.

It was argued this morning by Mr. Sopinka that it was improper and unethical for Mr. Percival to submit that Susan Nelles may have been involved in a conspiracy. He said that this proposition was not supported by the evidence and went on to say that in fact that particular question, her involvement in a conspiracy, was not put to the witness. As was pointed out in his very next breath, that very question was put to the witness by her own counsel and she did deny any involvement in the deaths of these children.

Sir, whether Susan Nelles or someone else took the lives of these children is not a fact that I expected nor, sir, do I imagine that you expected them to freely admit, when they took the witness stand. The very fact that one denies an allegation or a question put to them does not mean that it is not open to counsel to make inferences based upon the denial. That, sir, is what we did.

I would remind you, sir, that there is some evidence from Meredith Frise and Liz Radojewski

that tends to indicate that two individuals may well have been involved in murdering these children. Then, based upon all of those facts, we made the allegation that we did, I quite boldly state right now, sir, that there is absolutely nothing unethical about that.

Thank you, sir.

THE COMMISSIONER: Thank you. Mr. Brown.

REPLY ARUMENT BY MR. BROWN:

MR. BROWN: I address myself, if I might, sir, with your leave simply to the evidence of Liz Radojewski and Meredith Frise. Having said that, I cannot put my hands on the evidence.

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THE COMMISSIONER: Well, can you refer me to them? But I think I know -- is it Miss Frise who said --

MR. BROWN: Miss Frise said that she mentioned that to the police either just prior to the end of the preliminary inquiry or shortly after the discharge.

Miss Frise also said significantly that she had absolutely no basis whatsoever for her opinion and that is clearly on the record, sir.

And then in respect of Mrs. Radojewski - I believe at the bottom fifth portion of one page of this voluminous transcript - the lookout theory was put to her as perhaps accounting for the reason people could not detect a deliberate overdose of digoxin. She agreed with it. It was a hypothetical without reference to any particular person.

Beyond that, sir, I have no submissions.

THE COMMISSIONER: Yes. All right. Thank you.

Do you want to take a break now?

MR. LAMEK: Yes. Could we take a break now, Mr. Commissioner, and I will be through by lunch.

THE COMMISSIONER: We will be through

by lunch, you say?

MR. LAMEK: Yes.

THE COMMISSIONER: And Miss Cronk, are you going to --

MS. CRONK: I am not, sir.

THE COMMISSIONER: Well then, all right. I think we will take our 20 minutes now.

MR. LAMEK: Thank you, sir.

--- Short recess

--- On resuming

THE COMMISSIONER: Well now, I am going to make these announcements. The audience has disappeared entirely, but I've been unable to move the hard hearts of either Mr. Lamek or Miss Cronk to start earlier in Phase II. So, it means the week of the 9th of July we will start and in light of what problems Mr. Hunt has, and Miss Cecchetto, and everyone seems to be agreeable, we go five days that week from the 9th of July and we will not sit the following week, nor the following two weeks. There will be three weeks off. We will start on Tuesday after holidays which, I think, is Tuesday, the 7th, - 7th of August, and we will sit three days. We still have lost a day but we may be able to rise above that and we may have to make up that day that we have lost.

We will start on the 7th of August and go on until the matter is disposed of, which I am not making any predictions. I have done that in the past.

All right. Mr. Lamek?

MR. LAMEK: Thank you, sir.

REPLY ARGUMENT BY MR. LAMEK:

I have given a promise we will be through by lunch.

Someone referred this morning, sir, to dealing frontly with submissions that have been made. I suppose that is how I propose to reply to a couple of rather basic propositions put to you by my learned friend, Mr. Scott. And submissions which I suggest simply do not bear scrutiny.

The first such submission was that doctors, men and women of science, just don't think the way lawyers and, certainly, other lesser mortals think.

They deal, Mr. Scott told you, with objective facts and data. At page 927 of Volume 154, Mr. Scott, speaking of a man of science, said:

> "He does not create any hypothetical possibilities. Rather he searches from possibilities that arise from the facts with a data base itself. He does not add any possibility onto

"his list of diagnoses that does not have some factual foundation in objective data as it relates to a particular patient. He does not deal, and this will be odd to lawyers, in trends, statistics or averages. The last case does not exist in the diagnosis of the next case. Although cases may have in the end common features, each case for a doctor must be examined uniquely and be diagnosed exclusively on the facts that case alone reveals. That is the scientific approach."

And to that, sir, I make three responses.

First, I say with respect that it is simply not so. Everyone, be he physician, surgeon, lawyer, nuclear physicist or TV repairman, brings to each new situation his own stored experience and the shared experience of his peers and predecessors.

If my learned friend is really suggesting that for every new patient a physician re-invents either diagnostic or therapeutic wheel, that suggestion simply does not make sense. And, here, as the summer of 1980 lengthened into the fall

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and winter it must have been plain and, indeed, on the evidence it was plain to the cardiologists at the hospital that they were seeing deaths on the wards in numbers that were unprecedented in their experience and that the sheer numbers demanded an explanation or rationalization.

The professionals say that it is clear to physicians and surgeons by December of 1980 that treating these deaths one by one as they occurred was not productive and that a retrospective look at the whole six month period was required to see if any global explanation could be found.

Clearly, on the face of the record, the impetus coming from Dr. Trusler in December, in a meeting held early in January, tells us that doctors did not, as this period progressed, view these matters one at a time.

Second. If physicians and other men of science were indeed to pay no attention to anything that they could not observe, record, weigh and measure in the particular case, then in a practical world they would be fools and these physicians are clearly not fools. They are the cream of their profession.

Medicine is an applied science and in a real world practical realities of what is happening

about them have to be borne in mind. I don't mean that these physicians should have contemplated the existence and operation of deliberately malignant agencies, but only that when confronted by unusual situations they had to be prepared to look carefully for unusual explanations.

And, third. It is clear that the cardiologists did look for unusual explanations and they did not behave and think in the narrow and, perhaps, blinkered way that Mr. Scott suggests is habitual for scientists.

In light of what Mr. Scott has said, I feel obliged to say this, sir. That if there is a criticism to be made of the cardiologists at the hospital it is not that they thought as only scientists think, as Mr. Scott suggests, it is that they did not think as scientists think. They produced hypotheses which might well have explained the increased number of deaths. They formed the impression, or hypothesis, if you will, that they were dealing with a younger, sicker ward population. They formed the impression, or hypothesis, that there was a shortage of nursing staff at night. And those are perfectly perspectable. and plausible hypotheses, but scientific method, as I understand it, doesn't end with the formulization of a hypothesis; it goes on to test the hypothesis;

it goes on to probe it, to challenge it, to examine it and ultimately to accept it as valid, to reject it as invalid or to reformulate it. And the huge sadness is that the cardiologists did nothing to test either of the hypotheses which they formulated to explain these deaths. Enquiry would have demonstrated the invalidity of each of their hypotheses and the bright minds of those supremely skilled doctors would have been forced to look elsewhere for an explanation of the ward deaths.

It is not my purpose to attack or to be critical of any members of the very dedicated staff of that hospital. And in my submissions I avoided any such criticism. Even if criticism be out of place in your report, I felt obliged to respond to my learned friend's submissions that the approach of the doctors here can be justified on the grounds that they don't approach problems. They don't think in the way that we and you and I, and other people do.

I won't bother too much with that except my friend goes further with it.

Mr. Scott's proposition, if it were to be accepted, would not serve only as a justification of the hospital's response to the events of the epidemic period, it would serve also as the touch-stone for what

you can properly say in your report. Because my learned friend, Mr. Scott, says that your report has to have credibility for the medical and scientific communities and to have such credibility it may only traffic in the coin of what he says is scientific thought, and certainly containing nothing that is not susceptible of proof, and there is no room for impression, suspicion or ambiguity, he would have you say.

By way of response to that, I say that even if my learned friend be correct about the special way in which scientists think, scientists comprise but of the constituencies to be served by this Inquiry and by your report.

It is, of course, important that the questions of physicians and scientists be satisfactorily answered, but it is, in my respectful submission, vastly more important that other constituencies whose members may not think as scientists do, that other constituencies find your report satisfactory. I refer, of course, to the parents in particular and to the public in general.

Now, Mr. Scott has, of course, made submissions that the non-scientists, too, will best be served by this scrupulous avoidance of any expression of suspicion or concern in your report.

He says, if I understand him correctly, that where using some clear standard of proof you are satisfied as to the cause of death of any child you should clearly so state, but he also says that when you have any measure of uncertainty you must report merely that you cannot report on how a child died and you should not record any suspicions that you may entertain.

And that proposition, in my submission, comes to this: that suspicion has been rampant for too long and the way to put an end to it is to refuse to acknowledge its existence. And in my respectful submission a totally untenable position.

It is naive, I suggest, to think that any persons or parents - particularly any parents - concerns, fears or suspicions will be laid to rest by your saying you simply cannot express a conclusion as to how a child died. Now, equally, I acknowledge that your reporting that you find a child's death to have been suspicious is not going to bring comfort or certainty to that parent, but since, on either basis, comfort and certainty are simply not available, whatever you say, that it should, in my submission, be at least total honesty. The parents and the public can demand no more, but I suggest that they deserve no less.

And if your view at the end of the day, sir, is that baby A's death cannot with confidence be classified as either natural or not natural but that there is evidence which, viewed as a whole, causes you to entertain suspicion that the death may not have been due to natural causes, you should, in my submission, say so.

If I may say so, the public and parents, I suggest, are not looking for scientific certainty. I hope there are two ways to expect that. What they do look for is the best judgment and common sense of one who by training and experience and by reputation knows how to sift and weigh evidence and to express a measured, considered opinion.

It is clear from what the Attorney General said in announcing your appointment to the Royal Commission that the prime object of this whole exercise was, in my submission, it remains, to have a complete public hearing of all the matters surrounding and relating to these sad events. And, in my submission, there is no merit to Mr. Scott's suggestion that to that purpose applied only to the hearings and has now been achieved and that a different, more closed mouth considerations are applicable to your report.

In my submission, the public will not be well served by anything less than your full and

frank view of all of the evidence.

Mr. Scott's guidelines, if they were to be followed, would, I suggest, result in a report that understated the extent of the concerns that you might have. It would minimize and contain the scope and the true dimensions of what on the evidence that you believe or suspect to have occurred at the hospital in the epidemic period.

Nobody is interested in denegrating the hospital. The hospital is too important to this community for that. In my submission, the story has to be told, once and for all, and for my part I find it difficult to accept the reputation of the Hospital for Sick Children is so fragile, or that its status is so insecurely based, that either will be lastingly damaged by the fullest expression of your views in this matter. Quite the contrary. In my submission, confidence in the long haul is restored by full disclosure. It is damaged, and, perhaps, irreparably damaged, by anything that is perceived as an attempt to minimize or to cover up whatever may have occurred.

If there was indeed a killer on the staff at the hospital I have to say that I have such trust in the basic good sense of the public to believe that it will recognize that that does not redound to

the discredit of the hospital.

We have all learned the bitter truth over and over again that no profession, no institution, no community can ever be immune from an aberrant or antisocial personality, and if I be right in that, the scope or even the suspected scope of such a person's activities is not a matter that you should be reluctant to consider or to state.

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In your consideration of it it is my submission you are entitled, indeed obliged to consider all of the evidence.

I respectfully adopt the submissions of my friend Mr. Hunt who addressed Mr. Scott's proposition of what he called the non-medical circumstancial evidence should be ignored by you.

To say as Mr. Scott says that each item of circumstancial evidence taken alone is neutral, or ambivalent and thus of no probitive value is too easy. Where the items coalesce to form a mass of sufficient weight to give you concern, you are in my submission entitled to so state. It is on such bases that men and women make decisions that affect their lives and the lives of those about them and in my judgment the public wants to know and is entitled to know what views you have formed and on of the evidence. It may be confident that will not likely entertain or express suspicion, but if you do entertain it then in my respectful submission you must say so with the reasons therefore.

In that regard I reject respectfully but utterly Mr. Scott's attempt to equate any views that you might form as to levels of suspicion surrounding certain deaths with the ill-founded

suspicions, hunches, guesses of the man on the street or a fortune teller was one of his expressions. I know my learned friend had no intention to give offence when he made that attempt. It is in my respectful submission idle to say any suspicions you may harbour, after hearing and considering all of the evidence, will be viewed by the public as adding nothing of value to the general understanding of this affair.

In the more than three years since the matter of the baby deaths came to the public's attention there have no doubt been rumours, speculations, gossip and expressions of suspicion, all more or less ill-founded.

It cannot seriously be suggested that the seriously held suspicions of one such as you, who has heard, sifted and weighed all of the evidence that has been adduced here, will be regarded as merely more of the same badly informed stuff. If after serious consideration you should conclude, sir, that there are elements in the evidence about the death of any child that caused you to suspect that digoxin toxicity may have played a part in that death, then in my suspicion it is for you to say so.

May I turn from matters of the approach

urged upon you by Mr. Scott on particular matters. Mr. Scott has suggested that there was no evidence that oral resuscitation efforts in the cardiology wards in the epidemic period were unsuccessful. His point as I understood it was that an inability to resuscitate a child in the epidemic period was a matter of no significance.

Now the incidence of Code 25 calls and of successful resuscitation efforts was in fact examined by the Authors of the Atlanta Report, and the evidence about it is found in Volume 90 beginning at page 289, the following exchange beginning at line 8 occurred and this is in direct examination by myself.

"Q. You also considered the incidents of Code 25 calls. You looked at those on a quarterly basis from January 1979 to March 2nd, 1982. What information was available with respect to Code 25 calls?

(ANSWERS BY DR. WALLACE)

A. The only information available was a log kept by the telephone operator.

Q. Internal telephone operator of the Hospital?

"A. Yes. This was the source of data that we worked from on this.

Q. What information was contained in the log?

A. It simply contained the date and the time of the call and the ward to which it had been directed.

Q. Not the patient?

A. No, there was no patient identification.

Q. Do you recall that in the nine-month epidemic period there were some 27 Code 25 calls to the cardiology wards.

I understand you were working with what, 35 or 36 deaths in the period?"

And Dr. Smith answered.

"A. 56 altogether ward associated deaths, 36 in the epidemic period.

Q. 36? I tell you I am aware of 5 patients who died on the ward in the epidemic period for whom there was a "Do not resuscitate" order in effect and I believe on page 15 of your report you also say 5 of the 36 were classified

"as 'do not resuscitate' about a little over a third of the way down the page, and those five as I recall it were Floryn, Heyworth, Leith, Murphy and Perreault.

I can only give you my best recollection, but my best recollection is there were resuscitations efforts on all the other children. I don't know whether you have similar recollection from your review of anything you took from the charts, but obviously the mathematics don't compute if I am right?

A. There may have been a resuscitation effort for which there was no Code 25 called. If the physicians were already on the ward --

Q. Right.

A. There might not have been a call put through to the operator.

Q. Were you satisfied that the data you received from the operator's log was complete and accurate?

(ANSWERS BY DR. WALLACE)

A. We had no way of knowing. We

"have to accept this data.
We did discover some inaccuracies in that she had used a 24-hour clock and had forgotten to change the date sometimes but --
Q. An easy thing to do, yes.
A. Minor things like that.
Q. Were you aware of any successful resuscitation attempts on the cardiology wards in the nine month period?
A. We were aware of only one successful attempt in a child who subsequently died four days later.
Q. This was Estrella?
A. Estrella I think."
And then Dr. Buehler said:
"A. Later in the report we mentioned the Code 25 calls again and there were Code 25 calls for whom we could not identify the patient for whom the call was made?
Q. Yes.
A. Therefore there may have been more successful resuscitations."
Clearly they were not able to track

'any and the numbers they found were more than completely accounted for by the numbers of resuscitation efforts they were aware of.

Miss Nelles in Volume 124, page 8188 said that her recollections took her only this far, that in the epidemic period there were no successful resuscitation efforts other than the Estrella one. Mrs. Trayner's evidence was to the same effect.

It comes to this, Mr. Commissioner, that in the epidemic period the only known successful resuscitation was with respect to the Code 25 called for Janice Estrella on January 7th, 1981. Now whether that be a fact to which you can attach any significance at all when viewing in the round the evidence concerning this child's death, is of course a matter for you to determine, but it does seem indeed on the evidence that we have to have been a notable feature notwithstanding the normal 11 per cent to 15 per cent

success rate Dr. Rowe told us about in resuscitation efforts, there is no evidence of a successful resuscitation on the cariology wards in this period other than that of Estrella on January the 7th.

Perhaps I can take this opportunity at this point to respond to Mr. Scott's repeated statements about the significance that I have suggested might attach to any of these matters of pattern or circumstances.

My learned friend Mr. Scott would have you believe that my submission comes to this: that if the death was sudden and unexpected that is a suspicious element. If the resuscitation effort was unsuccessful, that is a suspicious element.

If the pathologist could not identify the cause of death at autopsy, that is a suspicious element.

With respect I say that distorts my submission and perhaps in the hope that I can clarify it, if clarification be needed, I can restate it for myself rather than have Mr. Scott restate it.

It is this, that there are certain facts which in my submission compel you to approach

each and every oneof these deaths not with a presumption of a non-natural cause but with the need to be alert for indications of a non-natural cause. Those facts are these:

An increase which the epidemiologists described as statistically significant in the onward mortality rate during the epidemic period.

A remarkable clustering of very, very many of the deaths in a narrow time frame, between 1 o'clock and 5 o'clock in the morning.

An observed strong association between almost all of those deaths and one or more members of a particular nursing team.'

The fact, if you accept my submissions with respect to Cook, and a fortiori if you accept my submissions about other children in that group of 8, the fact that one or more children did die of digoxin toxicity resulting from an unprescribed dose of digoxin in an amount, according to the experts, and in circumstances which make it at least difficult and at most impossible to believe that the dose was administered by accident or error.

Finally the fact that the spate of deaths came to a sudden and total stop on March the 22nd, 1981.

I will have more to say about that last point later in the context of commenting upon Mr. Percival's submissions. At the moment I say these are all matters which you as a whole can support a conclusion that one or more babies died by foul play. The question of course then becomes whether there were any such, and if so, how many and which babies died in that way. But in considering cases where there is no, or no clear toxicological evidence, I say you are entitled to look at all of those circumstances. They are not necessarily neutral circumstances, Mr. Scott contends.

The nature of a child's terminal events and the symptoms displayed have to be considered in my submission. They may be such that you are able to say that digoxin toxicity played no part in the deaths. He may have displayed none of the symptoms that are recognized as suggestive of digoxin intoxication. If on the other hand the child did develop arrhythmias, sudden and severe bradycardia, heart block, fibrillation, you cannot of course, and I don't suggest that you can say on that evidence alone that digoxin played a part in the death. It merely tells you that you cannot rule digoxin out.

If on a review of all of the circumstances you come to a situation where there is no clear

natural reason for a child having died as he did and when he did, and there is no circumstance or event that rules out digoxin involvement, and there are several factors that are consistent with digoxin involvement, then on that total view and not on the basis of any one circumstance you are in my submission entitled to say, if it be your view, that you have a level of concern or suspicion about that death, that it may be attributable to digoxin toxicity.

Mr. Scott says you cannot, and I should not place any reliance on patterns as to time of death, or presence of hospital personnel. Because he says, quite correctly, that some of the children of whom I have submitted that their deaths were natural also fit the pattern of time of death/presence of nursing team and so on. In my submission my learned friend's attack on the references to and use of the patterns is misconceived.

If, for example, all 36 of the children had had red hair and green eyes, one might see a pattern or a common thread and entertain the possibility that someone was selecting for death babies with those physical characteristics. But I make two observations, sir. One, it would not be legitimate to assume without more that all of those

36 babies were killed. Because even children with red hair and green eyes can be so deperately sick that they die of their diseased conditions and some of the 36 may have so died.

Second, the fact that eight, ten, twelve of the those read-haired green-eyed children did die naturally does not detract from the possible significance of the common thread which with other factors and circumstances might serve to arouse some suspicion. So here in my submission the fact that some babies while apparently fitting into the pattern died natural deaths, does not detract from the significance of the pattern.

Miss Kitely's point is right of course, the smaller the number of elements in the pattern the less significance the pattern has. There is still a significant number of deaths which fall into the pattern and which are not really natural.

Finally with respect to Mr. Scott's binder of materials about the babies. I must say I commend him and his helpers for the industry in compiling the material. As is always the case with summaries of views and opinions, the binder contains in my submission numerous matters which don't completely accurately or clearly summarize the evidence, but I

shall not take the time to detail those.

I point out merely, and I certainly intend no criticism in doing so, that the document is necessarily argumentative to some measure rather than coldly objective and Mr. Scott was frank to say that although objectivity had been aimed for one could not discount the position which he has taken.

I turn to the submissions of Mr. Ortved who referred to one matter only, and that only for the sake of clarification. It arose in the context, sir, of your exchange with Mr. Ortved, which is found in Volume 155, page 1206, about the failure of Drs. Freedom and Taylor to take any steps, or to make any enquiry to check the 72 nanogram level reported on Janice Estrella.

- - - -

P/ko

Line 8, page 1206, sir, you said:

"They never asked the biochemist if he made a mathematical error?

MR. ORTVED: They did not go back to the biochemist. That was what Dr. Mancer and Dr. Taylor considered when they got together and they could not run it to ground."

You commented on that and then Mr. Ortved, at the bottom of the page, said:

"In fairness they did check it. They did re-calculate it, Mr. Mancer and Dr. Taylor did and they found out the value of 72 was correct and at which point in time they decided that it must be an artifact, that it must have to do with the contaminated sample. That was the evidence."

My point of clarification is really, sir, that indeed it was the evidence but the checking by Drs. Mancer and Taylor was in March after the serum concentration of Pacsai had been reported. It was not checking or enquiry that was made at the time of the initial report of the 72 nanogram level in Estrella.

The evidence in that regard is found in Dr. Mancer's evidence in Volume 40, page 8062, and again beginning at page 8086.

I move to submissions made by my friend Mr. Strathy and refer first to what I call the Cook medication error theory. As I understand it Mr. Strathy postulates that some time after 3:45 and probably after the calling of the arrest an adult vial of digoxin was administered via intracardiac injection. He says the ward was ripe at that time for a medication error, there was a very high stress level and the fact that the digoxin had been locked up perhaps made people less alert to spot the presence of digoxin on the crash cart. He suggests that there was digoxin on the crash cart and it had been overlooked in Costigan's search earlier that night or that it had got there after Costigan and Mounstephen had made their search, although he thought the former was more likely.

In my respectful submission that is a most unlikely scenario. Costigan was the man who had uncovered the hideous digoxin problem. It was he who had taken the Pacsai levels to Dr. Carver. He had on his own initiative ordered a post mortem digoxin level on Miller the previous week. He reported the Miller situation to Carver again late on Saturday afternoon.

He had met with Carver when the awful news of Miller's levels was available on Saturday afternoon. He more than anybody was aware of the ramifications of the Pacsai and Miller findings and, more important, of the focus of the digoxin problem on the cardiology wards.

Now, Mr. Strathy suggests that Costigan, not expecting to find digoxin on the crash cart, may have been perhaps lulled into not checking too closely. Costigan was not doing a general check of all drugs on the crash cart. He was looking only for digoxin. That is his evidence in Volume 45, page 129. If Costigan and Mounstephen were prone that night to overlook digoxin on the crash cart because they did not expect to find it, it is interesting that they did find it on several crash carts in several locations. Exhibit 205 discloses that the cart was one of the places that they expressly looked. It was found on Ward 4C on the cart, on 5C on the cart; on 5B on the cart; on 7F on the cart and on 7G on the cart. They were not so confident about finding this drug on crash carts that they did not find it in six locations. If they were alert enough to find it in those other locations in my respectful submission it is simply not plausible that they would have overlooked digoxin on the crash cart in the prime target area which

was Wards 4A and 4B. Indeed, although the more leisurely inventory taken the next day showed some digoxin that Costigan and Mounstephen had missed they had not missed any on Wards 4A and 4B. There was every reason, in my submission, to believe that they were exceedingly alert in that location to find and record and to have locked up the digoxin. In my submission it is simply not credible that Costigan would not have checked 4A and 4B on the crash carts within an inch of their lives and it is the sheerest speculation that if digoxin was on the 4A crash cart I suggest it flies in the face of reason to think that Costigan missed it.

But even to accept it was there and was administered, one has again to accept a whole sequence of errors. Digoxin on the cart at all; adult digoxin on the cart, not pediatric; missed by Costigan and Mounstephen; not checked by the nurse who picked it up and drew it up; not checked by the doctor who took the syringe from her and administered it. In my submission that is a most unlikely sequence and Dr. Spielberg was the only one to concede that any kind of a sequence like that was likely.

My friend Mr. Strathy continues to compound his speculation by suggesting that the blood

sample recorded as having been drawn at 4:30 in the morning was in reality drawn between 4:32 and 4:37. As I understand it he so suggests because that was the period, he says, when a new IV line was being started. Even if that was happening at that time it is not in my submission any reason to think that blood was withdrawn after 4:30 as the sample was apparently labelled.

I say that for two reasons: first there is nothing in the evidence to suggest that the sample was drawn at any time other than 4:30. In Volume 156, beginning at page 1351 my friend, Mr. Strathy, read the evidence of Dr. Mounstephen, beginning at line 9, Referring to the evidence of Dr. Mounstephen you said:

> "And then that was entered as an exhibit and at line 15, page 133 and the question is:
>
> 'Q. You indicated both of these are in your writing and Exhibit No. 59 is the requisition number 05491 and it appears to have a time on it in addition to the 6:05 time that is stamped on the requisition. There is another time that appears you have written in.

"'A. That's probably when I filled it out.

Q. 04:30 hours?

A. Right. It was probably during the cardiac arrest some time.

Q. So, 05491 would be a blood sample that was obtained by somebody during the arrest and you have put on the time that the blood sample was obtained. Is that correct?

A. Yes.

Q. 04:30 hours?

A. Right.'"

Now, there is nothing in that evidence of Dr. Mounstephen to suggest that that 04:30 is not the right time to put on that sample as having been drawn. There is certainly no basis there to suggest that it was drawn at some later time.

Second, if as Dr. Mounstephen suggests it was Dr. Jedeikin who drew the blood and drew it from the femoral vein, and that also appears in the evidence that Mr. Strathy read to you, sir, then the likelihood is that that was done by Dr. Jedeikin before difficulties were encountered with the IV because as soon as the difficulties with the IV became apparent,

as Mr. Strathy has pointed out Dr. Jedeikin was busy trying to get a new IV line going. Blood for sampling, testing, assaying, in my submission would not be drawn through the IV anyway. We have heard that sampling of the injection site was bad practice. Drugs had been administered by IV frequently since 4:20. In my submission it is far more natural and reasonable to believe that blood was drawn from some blood vessel at the site other than that of the IV, the femoral vein as testified by Dr. Mounstephen --

MR. STRATHY: Mr. Commissioner, I only interrupt because I think that this is a matter of evidence that my friend is putting to you. As I recall I read to you the evidence of Dr. Jedeikin who said that in fact the sample was taken when the IV was put into the femoral vein and it was at that time that the pull back was made and some of the blood was taken. That is when the sample was taken. I do not have the transcript with me, but I recall it was in Dr. Jedeikin's evidence.

MR. LAMEK: My friend is right. The difficulty is to know just when that occurred, I suppose.

My friend, though, uses the fact that at 4:32 there was intracardiac administration of adrenalin as indication that the IV was not running at

that time. Then he says if the IV had been running then they would not have had to give the adrenalin directly into the heart. That I understand was his submission.

With respect, that is not the reason for giving intracardiac adrenalin. As I understand it injection directly into the heart is done to achieve an immediate effect. It is a sort of special delivery. I note of course that the intracardiac injections were given at other times during the Cook arrest when presumably an IV was in place at 0450 and 0453. We have seen the same thing in other arrest situations as well. The fact that the drug was administered by intracardiac injection at 0432 is no indication of whether the IV was running at that time or not. That was not an emergency measure taken for lack of an IV, it was an emergency measure taken for reasons of its own.

Mr. Strathy's hypothesis in my submission has other serious difficulties. First, although digoxin and adrenalin ampules are indeed clear and filled with colourless material, the adrenalin ampule is significantly smaller and thinner than the adult digoxin ampule, as found in Exhibit 224, so you can observe them for yourself, has a red band

as contrasted with a gold band on the digoxin ampule. In my submission there is sufficient difference to reduce the likelihood of error.

Next, although Mr. Strathy stressed in argument that the time of Baby Cook's arrest pre-drawn and pre-prepared arrest medication was not in use thus opening at least the possibility, however remote, that the wrong drug was drawn up during the resuscitation effort, he bases that on Dr. Spielberg's evidence and refers to Dr. Spielberg. Dr. Spielberg was not on the staff of the Hospital for Sick Children at the time of these events and he could have no personal knowledge as to whether pre-prepared adrenalin was on the crash carts at the time of the arrest. Such evidence as we have is against Dr. Spielberg's view, as adopted by Mr. Strathy. I refer to Exhibit 294, sir.

Exhibit 294 is a memorandum from Mr. Snedden on the subject of "CALL 25 and Ward 4A and B." The memorandum is dated April 13, 1981. Interestingly, attached to it is an extract from the Nursing Procedures Manual of the hospital, a two page extract. The foot of the second page is identified "HSC/9/80" suggesting in my submission that the document was circulated in September of 1980, in the early stages of the epidemic period.

On page 2 of that extract the following appears:

> "The sodium bicarbonate, 8.42% and Epinephrine 1:10,000, come in pre-mixed syringes that require only the screwing in of the 'barrel' containing the drug. Further supply of these and other drugs are in the top drawer of the crash cart. If Epinephrine 1:20,000 is required, use a 20 ml syringe, draw up 19 ml sterile water and 1 ml Epinephrine, 1:1,000."

Dr. Spielberg's evidence, interestingly, refers to the 1:10,000 concentration. It appears from the extract from the nursing manual attached to Mr. Snedden's memorandum that as of September 1980 epinephrine, adrenalin, was in pre-mixed syringes and only needed to be attached to the needle and administered. If that be so then of course the possibility of error in the administration of adrenalin becomes even more remote.

It is essential too, for Mr. Strathy's hypothesis, that the digoxin which he says may have been given in error was administered directly into the heart because on the evidence that we have heard from

the experts there is no other way or route of administration that could possibly explain the digoxin concentration recorded in Baby Cook. He says therefore either that the 0429 adrenalin administration or the 0432 adrenalin doses could have been the occasion for the unintentional administration of digoxin and he says that we don't know, with the 4:29 adrenalin, how that adrenalin was administered. Then he suggests that too could have been intracardiac administration.

True it is we do not know that with certainty but we do know that it was apparently the practice to indicate expressly intracardiac injections.

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If you would look at page 30 of the Cook Chart, sir. Page 30 lists the drugs administered at during resuscitation, the times of administration.

There are three injections, or administrations, which are recorded as being intracardiac. The 4:32 adrenaline, the 4:50 adrenaline and the 4:53 calcium. And, my submission, the lack of such a note of intracardiac injection with respect to the 4:29 adrenaline at least strongly suggests that that was not an intracardiac injection. And if that be so, Mr. Strathy's theory is really in this catch 22 situation.

If the blood sample for digoxin was drawn at 4:30, as in my submission the evidence strongly indicates, then the substitution of digoxin for adrenaline in the intracardiac injection at 4:32 couldn't account for the dig level 72 measured in the sample because that injection was after the sample. That level, then, could only result from Mr. Strathy's other choice of 4:29 adrenaline injection but unless the 4:29 injection were intracardiac, as to which there is no evidence, and indeed a suggestion from the evidence to the contrary, unless that 4:29 administration were intracardiac, digoxin administered I.V. at 4:29 could not, on any of the pharmacological evidence that

you have heard, account for the tissue levels found in Cook. And, indeed, given the kind of dose that is postulated, one adult ampule, a sampling of serum taken one to two minutes after administration would presumably be far higher than the 72 or 69, whatever it was recorded.

Dr. Spielberg's evidence, in Volume 54, page 2013 and 1998 in that same volume , all suggest that you would expect to find astronomically high serum levels in a sample drawn so soon after administration.

And finally, it is implicit in Mr. Strathy's theory that Cook's arrest was caused not by digoxin but presumably by his disease condition. In other words, Cook suffered another severe blue spell of the kind that occurred at 6:00 p.m. of the previous evening which is what the physicians at the time understandably thought.

Now, if that were so one must explain, of course, why the inderal administered to the baby at 3:50 had no benefical affect as it had had at 6:00 to 6:30 the evening before.

There is three possible explanations, I suggest. First, the one that which Mr. Strathy must embrace, but although the inderal on Saturday

evening had a wonderously restortive affect, on Saturday morning, as on the evidence that sometimes happened, it had none. That is one possibility.

Second, the other theory that we have heard that by error digoxin was given instead of inderal. And I have already made my submissions as to the tenability or untenability as to that suggestion; or third , what Baby Cook was suffering at 3:45 was not a blue spell at all but toxicity from a huge overdose of digoxin, as I said earlier.

In short, Mr. Commissioner, it is my respectful submission that Mr. Strathy's theory as to the death of Justin Cook, although creative and imaginative, has too many holes in it to be plausible. In my submission, it runs counter to the evidence and blames rational inference that might be drawn from the evidence.

Now, Mr. Strathy also made submissions to the effect that medication errors could also account for the digoxin levels in Babies Lombardo, Belanger and Hines, and in so doing, he made submissions about Dr. Seccombe's substance X and about evidence as to the elimination half life of digoxin and to SIDS, as well. You have my submissions and those of Miss Cronks on those matters. It would be of dubious

propriety to try to restate our submissions by way of a reply and I don't do that.

The differences between Mr. Strathy and Miss Cronk and me are clear - and I leave them with you, sir.

Just two other matters which I comment by way of reply.

Firstly, that Mr. Percival, that Mr. Percival's added starter to the list of possible explanations to the abrupt end of the epidemic period on March 22nd, 1981.

Mr. Sopinka has spoken to this matter this morning. I make no comment on Mr. Percival's suggestion. It is true that there is not a scrap of evidence for you to support it, but in candore there was no evidence whatsoever to support the possible explanations that I also listed in my submissions. I merely wanted to make clear what my purpose was in listing possible explanations as Mr. Percival, of course, referred to that in the course of his argument.

My point was, and is, that the sudden cessation of these deaths is itself a circumstance which may assist you to a conclusion as to whether the deaths in the preceeding nine months had been natural or no. If they were natural deaths - and this epidemic

period ended not with a whimper but with a bang - and the proponents of the theories that the deaths were due to natural causes and to the most appalling run of possible drug errors must persuade you that the clinical picture and the alleged pattern of terrible error that haunted the one nursing team on the one ward for so long suddenly resolved themselves.

In my submission, as I have said, that proposition defies credulity and I was attempting to canvass other, perhaps more credible possibilities, which might explain that sudden end but which necessarily for to do to deliberate invention by someone in the course of the patients who's death had been under review. That was my purpose, it was no more than that.

And in response to Mr. Percival's suggested fifth possibility explanation, I can only say that it had never been any part of my thinking, and certainly is not part of my submissions, that more than one person was involved in the deliberate administration of overdoses of digoxin which, in my submission, occurred.

As for my favourite explanation: that changed circumstances on the ward following Cook's death made it impossible for the perpetrator to continue.

Mr. Percival says that these changes were in place before Cook died and he, therefore, seems to suggest that that cannot have been the reason for the cessation of those activities. With respect, he is wrong.

Prior to Cook's death, digoxin had been locked up - or there was some delay in implementing that order - and digoxin had to be double signed as well as double checked. Although, again, we saw from the review of the chart that double signing wasn't immediately done either, but as of Sunday morning, after Cook's death, a whole new raft of changes came into effect; digoxin levels were drawn on all the patients; post mortem digoxin was ordered for every death; supervisors were on the wards with keys overseeing all drug administrations. Those things had not been in place prior to Cook's death and those things are the matters to which I refer when I say the circumstances so changed as to make a continuation of any activity on the ward, interference with children, difficult, if not impossible without inviting certain detection.

Finally, sir, with respect to the submissions of Miss Kitely. I make three brief points.

First, she may indeed attack the

methodology of the authors of the Atlanta Report as much as she likes and the authors were frank to admit that in some respect there methodology was less than perfect. And she may use the Haines instrument as a blunt instrument to club the C.D.C. as mightily as she likes, but the end of it all she has to acknowledge, as I know she did, that Dr. Haines and his colleagues, having reviewed the Atlanta Report and having set out what they believe to be proper criticisms of it, had to say this... and I take the liberty of repeating it, sir. It is on page 5 of the summary... Roman V:

> "Despite the difficulties with many of the studies described in the report we feel that several findings..."

And they refer to the key findings noted above. And they are set out on pages Roman I and II:

> "...are both valid and helpful in documenting and understanding the increased cardiology ward mortality during the July, 1980 - March, 1981 period.
>
> Furthermore, although each of the individual studies can be criticized from the perspective of epidemiologic

methodology, taken together they provide convincing evidence that there was indeed a substantial increase in cardiology ward mortality that can best be explained by untoward events in the infant room of Ward 4A."

Going onto refer to associations with Hospital personnel during the July, 1980 - March, 1981 period.

So, when the dust of methodological dispute are all settled, as I read the Haines Report, its conclusion is a method may not always comply with what we believe to be ideal practice but there is not an awful lot wrong with the conclusions. And in my submission there is no sufficient basis for refusing to accept the findings and conclusions of the Atlanta Report.

Second, Miss Kitely took you through a mathematical exercise about drug errors calculated to show, as I understood it, the number of fatal drug errors that could occur in the Hospital in a nine month period. I believe she produced a result of anywhere from 33 to 135 errors in a nine month period... on the basis of estimates of the number of drug errors

that could occur in that period. And Dr. Kauffman's view that less than one per cent - Miss Kitely conservatively took a .5 per cent would be fatal... might even by forgiven the words annualizing her nine month number, her number would be 44 to 180 fatal fatalities resulting from drug errors in a year.

Now, I am obliged to say, sir, I have some difficulty in understanding why, why to the fact that the Registered Nurses are presumably involved either in administration directly or in drawing up drugs, presumably to be involved in the vast majority of medication administration in the Hospital, why the counsel for the Registered Nurses Association would ask you to believe that a baby every two to eight days is killed by drug error in the Hospital for Sick Children. But, be that as it may, Miss Kitely's thesis still cannot explain why there is any reason to think that in this nine month period there should have been an unprecedented number of deaths on this ward... or resulting, or not resulting, in drug errors. Why those errors should have been made by the members of one nursing team and why that team should have been error proned, essentially when it was only working at nights.

Once again, it may be that if you look

merely at the numbers that may be thrown up by incidents, or presumed incidents of drug errors, and didn't pay any attention to what was actually happening on the wards, and the rather preculiar clusterings, to use a neutral term, that are evident, one could say, 'yes, that number of deaths could occur by drug error.' It is looking beyond those numbers and to the kind of thing that, in my submission, rational and normal human beings can only take into account when trying to form a judgement of something that you say is not the satisfactory explanation.

And Miss Kitely would have you ignore the pattern of the deaths, which is essential to her thesis they be ignored. In my submission, they cannot be. They are there. They have to be dealt with. And as the authors of the Atlanta Report pointed out any explanation of the epidemic period of deaths must take account of them. And those patterns, in my submission, make Miss Kitely's theory implausible.

Finally, with respect to Baby Estrella: Miss Kitely delivered written submissions to you, sir, are found at pages 39 to 40 as they relate to the Estrella Baby.

With respect to the providence of the sample in which the 72 level was recorded, Miss Kitely

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makes a number of points. First of which is found on page 39:

> "Dr. Taylor, who you remember did the autopsy, could not remember whether or not he had tied off the bowel. If he had, a small amount of fecal contamination would have resulted. If he had not, considerably more fetal contamination would have occurred."

.....

/cr

I agree with that point entirely, that is exactly what Dr. Taylor said that he couldn't recall. But he did say and this evidence is found in Volume 43, page 8722, that it was his usual practice to tie the bowel at the top and the bottom ends before cutting it.

Dr. Mancer, his evidence is found in Volume 41 at page 8326 appears to have regarded it as standard practice to tie the bowel before cutting it, he said that Taylor would have done that.

Point 2, I have no difficulty with that at all in Miss Kitely's formulation at page 39.

Point 3, she says "The protocol for the gutter blood study specifically required in Item 5 that the bowel was to be tied off prior to the removal in order to eliminate contamination of the abdomen".

She goes on in Point 4:

"Therfore there is likely a significant difference between the circumstances surrounding the gutter blood study and the Estrella sample, because the risk of contamination on the evidence with respect to Estrella is very high."

And with that of course I take issue. The risk of

contamination is very high only if the bowel was not tied. There is clearly no evidence that it was not. There is no clear evidence either way, but we do have as I say Dr. Taylor's evidence as to what he usually did, and Dr. Mancer's understanding as to what the practice was probably followed.

Now also we have Dr. Mancer's evidence with respect to the development of the protocol of the gutter blood study, it is found in Volume 41, beginning at page 8326, and this is at line 21, sir:

> "In Part A, where trying to duplicate what Dr. Taylor did with respect to tying parts of the bowel off, and it was his practice, as I obtained from him by telephone call shortly prior to drawing up his protocol, I found that he did tie the rectum and the jejeunum and he tried to avoid contamination by the contents."

I do not read that as saying that at the time of the telephone call Dr. Taylor said that is what I did. I read that as saying that Dr. Taylor told him that was indeed his practice. A practice which he apparently relayed to Dr. Mancer at the time

of the preparation of the protocol and not one that he testified to here for the first time. They were clearly attempting to duplicate what was done with respect to Estrella, so as to validate to the extent possible the results of the gutter blood study they were undertaking.

Based on information from Dr. Taylor it seemed the bowel was likely tied, that indeed was Dr. Mancer's understanding. Therefore, in my submission, the evidence as it has appeared before you does not support Miss Kitely's proposition that in likelihood there was high contamination from failure to tie off the bowel.

Generally, in my submission, the whole question of the possible digoxin contamination from the bowel depends in the first place on whether or not at the time of autopsy digoxin was present in fecal material, if it was not the way the bowel was tied would be relatively unimportant.

I concede readily that Dr. Taylor is no expert on that matter, he is no pharmacologist and he doesn't know anything about pharmacokinetics of digoxin. He did not perceive that was a likelihood, more important his practice appears to have been, and there is no reason to think that he did not follow it

here, to eliminate to the extent that he could the risk of contamination by tying off the bowel before he cut it.

In short, Mr. Commissioner, in my submission there are clearly questions about the sample in which the 72 nanogram was measured, we know that. In my submission Miss Kitely's points don't change the question that you have to consider, that is whether you take the view of Dr. Mirkin, Hastreiter or Kauffman, and you have my submissions as to that.

I add only this, that although Dr. Hastreiter and Dr. Kauffman took the cautious view and said they couldn't conclude a high probability of digoxin intoxication based on that 72 level, they and Mr. Cimbura too said they wouldn't dismiss the level completely. I don't know what that means, unless it means this: That even though they acknowledge there is a reasonable chance that the level may be what Dr. Fowler called a true bill, they were not prepared to assume that it was for the sake of formulating an opinion based upon it.

Dr. Mirkin of course took a different view in light of the overall results of the gutter blood study and his is a view that I have urged upon you.

Mr. Commissioner, those are my submissions, I have kept my promise.

THE COMMISSIONER: You have indeed. Have you any announcements to make?

MR. LAMEK: Only one if I may, sir. We are as you know a couple of weeks away from the beginning of Phase II. I think it would be useful if Counsel, all Counsel who as presently advised have standing in Phase II were to meet at an early stage to talk about what may happen there. I am suggesting tomorrow morning, if that be possible, in this room. It will be a private meeting of Counsel only, those with standing in Phase II, and perhaps at 10 o'clock, would that be agreeable? Thank you, sir.

THE COMMISSIONER: Does anyone else have anything. Well, we will meet again then on Monday, the 9th of July, perhaps not all of us. If there are any here that I won't see again I wish them the best, God speed, and I hope some day I will be able to join them in the practice before the Courts, or by the Courts, whatever it is.

If things don't go my way, then I will be happy to see you on the 9th of July.

MR. SHANAHAN: Thank you, Mr. Commissioner.

THE COMMISSIONER: Until then. Yes, Miss Kitely.

MISS KITELY: After we resume are we sitting five days, the week of the 9th?

THE COMMISSIONER: Yes, we are, that is all Mr. Hunt's fault and I want everybody to blame him, not blame me. We will not be sitting then for the three weeks after that, once Mr. Hunt can lecture the Crown-Attorneys, and once so I can lecture the judges, and once in the middle for a true holiday.

MISS KITELY: Thank you, sir.

---Whereupon the hearing adjourned at 12:35 p.m. until Monday, the 9th day of July, 1984 at 10:00 a.m.

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